IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs November 2, 2009

DARCY SMITH v. MARK DORSETT

Appeal from the General Sessions Court for Loudon County
No. 9917 & 9112 Jon Kerry Blackwood, Senior Judge

No. E2009-00296-COA-R3-CV - FILED FEBRUARY 4, 2010

Darcy Smith ("Mother") and Mark Dorsett ("Father") were divorced by order entered in September of 2004. The Permanent Parenting Plan entered by the Trial Court gave Mother primary residential custody of the parties' four minor children with Father to have custody on specified days during the week and on alternating weekends. In 2006, Mother obtained an Order of Protection against Father on behalf of the children. Mother then filed a motion to modify the Permanent Parenting Plan. After a trial, the Trial Court modified the Permanent Parenting Plan to suspend all of Father's co-parenting time with the parties' minor children. Father appeals to this Court. We vacate that portion of the Trial Court's order suspending all of Father's co-parenting time, and remand this case to the Trial Court to establish a suitable schedule of supervised visitation between Father and the minor children. The remainder of the Trial Court's order is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the General Sessions Court Vacated, in part; Affirmed, in part; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the Court, in which HERSCHEL P. FRANKS, P.J., and JOHN W. MCCLARTY, J., joined.

Lindsey Lander, Lenoir City, Tennessee, for the appellant, Mark Dorsett.

Dwaine B. Thomas, Madisonville, Tennessee, for the appellee, Darcy Smith.

OPINION

Background

In July of 2006, while Father was exercising his co-parenting time, an incident occurred wherein Father grabbed one of the minor children and pushed the child against a wall causing the child to suffer bruising. As a result of this incident, Mother filed for, and the General Sessions court granted, an Order of Protection. Father appealed to the Circuit Court, which held a hearing, examined the children *in camera*, and found that Father had physically and verbally abused the children. The Circuit Court extended the Order of Protection and subsequently entered an order suspending Father's co-parenting time and ordering that Father would have social contact with the children only upon the recommendation of Dr. Wilson, a child therapist who counseled the children.

In June of 2007, Mother filed a petition to modify the Permanent Parenting Plan. The hearing on Mother's petition was delayed due to the withdrawal of Father's attorney and the recusal of the General Sessions Judge. During this delay, Mother filed a motion for contempt alleging that Father was in contempt for allowing insurance coverage for the children to lapse, for failing to pay his proper share of medical and dental bills for the children, and for failing to pay attorney's fees as ordered. In August of 2008, Father filed a motion for supervised visitation. The case was tried in January of 2009.

After the trial during which the Trial Court heard not only testimony in open court but also testimony from all four of the children *in camera*, the Trial Court entered its order on January 30, 2009. In the January 30, 2009 order, the Trial Court found and held, *inter alia*, that Father's physical and verbal abuse of the children constituted a material change in circumstances since the entry of the Permanent Parenting Plan, and that it was in the best interest of the children for the Permanent Parenting Plan to be modified. The January 30, 2009 order, *inter alia*, suspended all of Father's co-parenting time with the children "pending further orders of the Court," found Father was not in contempt for any failure to provide health insurance and failure to pay dental bills, and ordered Father to pay specific dental bills. Father appeals the total suspension of his co-parenting time to this Court.

Discussion

Although not stated exactly as such, Father raises one issue on appeal: whether the Trial Court erred in suspending all of Father's co-parenting time with the parties' minor children. The record on appeal reveals that at the time of trial Father had not had visitation

with the children for more than three years. When Mother filed her petition in June of 2007, the parties' four children were all minors. Since that time, the oldest of the four children has turned eighteen. As such, we note that our discussion and resolution of the issue involved in this case pertains only to the parties' now three minor children.

Our review is *de novo* upon the record, accompanied by a presumption of correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). A trial court's conclusions of law are subject to a *de novo* review with no presumption of correctness. *S. Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

Our Supreme Court has held that a trial court may modify an award of child custody "when both a material change of circumstances has occurred and a change of custody is in the child's best interests." *Kendrick v. Shoemake*, 90 S.W.3d 566, 568 (Tenn. 2002). According to the *Kendrick* Court:

> As explained in *Blair* [*v. Badenhope*, 77 S.W.3d 137 (Tenn. 2002)], the "threshold issue" is whether a material change in circumstances has occurred after the initial custody determination. *Id.* at 150. While "[t]here are no hard and fast rules for determining when a child's circumstances have changed sufficiently to warrant a change of his or her custody," the following factors have formed a sound basis for determining whether a material change in circumstances has occurred: the change "has occurred after the entry of the order sought to be modified," the change "is not one that was known or reasonably anticipated when the order was entered," and the change "is one that affects the child's well-being in a meaningful way." *Id.* (citations omitted).

Kendrick, 90 S.W.3d at 570.

The Trial Court found that Father's physical and verbal abuse of the children, as found by both the General Sessions Court and the Circuit Court, constituted a material change in circumstances since the entry of the Permanent Parenting Plan. The evidence does not preponderate against this finding. The Trial Court further found that it was in the best interest of the children for the Permanent Parenting Plan to be modified. Given the findings of Father's physical and verbal abuse of the children, the evidence does not preponderate against this finding. It clearly would not be appropriate for Father to exercise co-parenting time to the extent provided in the original Permanent Parenting Plan at the present time.

Father's brief on appeal, however, argues that:

> [The January 30, 2009] Order as written can only be interpreted as a termination of [Father's] parental rights. The Findings and Conclusions leave no room for [Father] to rehabilitate himself nor does it offer an avenue by which he can re-establish contact and visitation with his minor children. The Order as written would serve to preclude [Father] from filing any further pleading that would allow him to take any action that would result in a credible claim by [Father] to re-establish contact with his minor children.

We agree with Father that the January 30, 2009 order effectively terminates Father's parental rights without his having been given the protections afforded a parent in a parental termination action. While we agree with the Trial Court that the incident wherein Father engaged in abusive behavior was wholly inappropriate, the evidence in the record on appeal is simply insufficient, even if the proper statutorily mandated steps had been taken, to terminate Father's parental rights. The January 30, 2009 order gives Father no tasks, steps, or options whatsoever which, if completed or complied with, would enable Father to petition the Trial Court to obtain a court order allowing him visitation. The January 30, 2009 order simply gives Father no options whatsoever with regard to any future contact with his children. As such, the order effectively terminates Father's parental rights while keeping his parental obligations in full force.

The Trial Court noted that Father had undergone anger management counseling. The Trial Court further found that "[t]he children have received counseling. As a result, their emotional health appears to be good." The children stated their preference that they do not want to visit with Father, and Mother asserted that when the children see Father "[t]hey just get really uptight and worried about it, upset. Sometimes they'll squabble amongst themselves for a day or two before we have to go to court. And they just get anxious about it." However, other than the children's stated preferences and Mother's vague assertions that visitation would harm the children, the record is devoid of evidence which would tend to show that supervised visitation between Father and the children would be inappropriate or against the best interest of the children.

We believe the record shows that it is in the children's best interest to allow Father the opportunity through appropriately supervised visitation between Father and the children to attempt to rebuild the relationship with his children. While we are not so naive as to believe that success is guaranteed or even likely by allowing supervised visitation between Father and the children, we do believe it is clearly in the children's best interest to allow that opportunity. We remind Mother that as the primary residential parent she has an obligation "to facilitate and encourage a close and continuing parent-child relationship

between the [children] and [Father], consistent with the best interest of the [children]." Tenn. Code Ann. § 36-6-106(a)(10) (2005).

We vacate that portion of the January 30, 2009 order suspending all of Father's co-parenting time, and remand this case to the Trial Court to establish a suitable schedule of supervised visitation between Father and the three minor children. The remainder of the Trial Court's order is affirmed. Mother is to do everything within her power to insure that the visitations between Father and the three minor children occur as scheduled.

Conclusion

The portion of the Trial Court's judgment suspending all of Father's co-parenting time is vacated, and this cause is remanded to the Trial Court to establish a suitable schedule of supervised visitation between Father and the three minor children, and for collection of the costs below. The remainder of the Trial Court's order is affirmed. The costs on appeal are assessed against the appellee, Darcy Smith.

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D. MICHAEL SWINEY, JUDGE